FILE COPY

Supreme Court, U.
FILED
DEC 13 1949
CHARLES ELMORE CROPLEY
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1949

No. 462

SIMPSON BROS., INC., A Corporation, *Petitioner,*

v.

DISTRICT OF COLUMBIA, A Municipal Corporation, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

VERNON E. WEST,
Corporation Counsel, D. C.,
CHESTER H. GRAY,
Principal Assistant Corporation Counsel, D. C.,
EDWARD A. BEARD,
Assistant Corporation Counsel, D. C.,
Attorneys for Respondent,
District Building,
Washington 4, D. C.

DIVISION OF PRINTING AND PUBLICATIONS—GOVERNMENT OF THE DISTRICT OF COLUMBIA

INDEX

Subject Index

	PAGE
Question Presented	1
Counter-Statement of the Case	2
Summary of Argument In Opposition to Allowance of Certiorari and Reasons for Denial of Writ	3
Argument	5
Conclusion	9

Cases Cited

A. M. Webb & Co., Inc. v. *Robert P. Miller Co.*, 176 F. 2d 679, 681 ..... 5, 8

Statutes Cited

Emergency Price Control Act of January 30, 1942, 56 Stat. 23 3
Price Control Extension Act of July 25, 1946, 60 Stat. 664 3

Miscellaneous

Decontrol Directive 1, 11 Fed. Reg. 9138 (1946) 3

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1949

No. 462

SIMPSON BROS., INC., A Corporation, *Petitioner,*

v.

DISTRICT OF COLUMBIA, A Municipal Corporation, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The opinions of the United States District Court for the District of Columbia rendered below herein are correctly cited by the petitioner at page 3 of its brief.

QUESTION PRESENTED

The sole question in this case is:

May a clause in a contract calling for adjustments in the delivery price of a commodity based upon fluctuations in the ceiling or maximum prices of that commodity established by the Office of Price Administration be construed to indemnify

the supplier against loss occasioned by the expiration of the Act creating the Office of Price Administration, a removal by the Price Decontrol Board, a subsequently-created entity, of price ceilings upon the commodity, and a resulting increase in price to the supplier caused in part by the existence of a free market in the commodity, in part by an increase in the minimum price to be paid producers pursuant to a Department of Agriculture directive and in part by the withdrawal of subsidies previously paid to producers and distributors of the commodity by the Department of Agriculture?

COUNTER-STATEMENT OF THE CASE

After competitive bidding, the petitioner, as low bidder, by formal contract agreed to supply certain dairy products to the respondent for a period from July 1 to September 30, 1946 upon a cost basis which created a total indebtedness to petitioner in the amount of $21,369.21. This amount was paid to petitioner by respondent. The action below sought to recover an additional amount of $4,485.92. The claim for this additional amount was premised upon a clause in the contract reading as follows:

> "It is the intention of these specifications to obtain competitive proposals from dairies quoting prices for delivery of milk, cream, and buttermilk to institutions, schools, child day care centers, listed herein, in the quantities set forth in the attached schedule for the period beginning July 1, 1946, and ending September 30, 1946.
>
> "Should the maximum prices as promulgated by the Office of Price Administration, which are in effect on the date of the opening of these bids, be increased or decreased during the life of the contract, payment will be made by the District of Columbia at a rate of increase or decrease, not to exceed the same ratio that the prices herein quoted

bear to the maximum prices authorized by the Office of Price Administration."

The Emergency Price Control Act of January 30, 1942, 56 Stat. 23, as amended,[1] creating the Office of Price Administration, expired by its terms on June 30, 1946

The Price Control Extension Act of July 25, 1946, 60 Stat. 664, reestablished authority in the Office of Price Administration to set price ceilings, but further vested authority in the Price Decontrol Board to withdraw suchever commodities as it deemed advisable from the jurisdiction of the Office of Price Administration. This the Price Decontrol Board did with respect to dairy products on August 20, 1946.[2]

Thereafter, during the life of the contract, increases directed by the Department of Agriculture in the minimum price to be paid producers for milk and the withdrawal of subsidies previously paid to producers and distributors of milk by the Department of Agriculture caused the increase in delivery price to the petitioner which it desires to pass on to respondent as a consumer. The parties filed opposing motions for summary judgment in the United States District Court for the District of Columbia, the respondent's motion being granted and the petitioner's motion being denied. (R. 47.) Appeal followed to the United States Court of Appeals for the District of Columbia Circuit and on September 6, 1949 said court affirmed the judgment appealed from. The instant Writ is sought from that judgment.

SUMMARY OF ARGUMENT IN OPPOSITION TO ALLOWANCE OF CERTIORARI AND REASONS FOR DENIAL OF WRIT

1. This case was decided according to applicable existing principles of contract law in effect in the District of Columbia.

[1] Subsequent amendments to the Act are set out in Footnote 2 of the Opinion of Judge Stephens, R. 52.

[2] Decontrol Directive 1, 11 Fed. Reg. 9138 (1946).

Neither the Price Decontrol Board nor the Department of Agriculture was a successor in interests to the Office of Price Administration such as to authorize or compel by implication the substitution of either of these entities for the Office of Price Administration in those portions of the contract relating to price adjustments contingent upon changes in the price ceiling of dairy products authorized by the Office of Price Administrtaion.

The so-called "escalator" clause in issue here was never intended to hold the petitioner harmless from any loss whatsoever. On the contrary it provided only for such price adjustments as might be brought about by the artificial influence of the Office of Price Administration upon the market in milk and was in part designed to insure compliance with law. All other business risks incident to brokerage and distribution under this contract were intended to be borne by the petitioner. Otherwise the competitive bidding and contract award would have been pure amphigory. Had the contract been intended as one providing for the supply of milk on a "cost-plus" basis the language used to convey that intent would have been specific and direct. Petitioner cannot hope to rewrite the contract to reach that result by claiming ambiguity in an unambiguous escalator clause.

2. No facet of the instant case is deemed to bring it within any category of those cases regarded as amenable to certiorari by this Court in Rule 38 (5) of the Rules of this Court and petitioner fails to assert any relationship between the instant case and such categories of cases in its jurisdictional statement.

Petitioner urges that a review of the legislation of Congress creating the Decontrol Board is necessary to reach a disposition in the instant case. (Pet. Br. 5.) Since the true gravamen of this case is the construction of a private contract, the legislation of Congress creating the Decontrol Board certainly need not be reviewed or interpreted, even if its enactment might conceivably have some remote retroactive effect upon the general principles of law governing the interpretation of private contracts.

Petitioner hints at a conflict between the District of Columbia Circuit and the Third Circuit in the principle to be applied in the

construction of unambiguous contracts and in that connection quotes from the case of A. M. Webb & Co., Inc. v. Robert P. Miller Co., 176 F. 2d 679, 681. (Pet. Br. 12, 13.) It is quite evident however, from even a casual reading of the portion of that case quoted in petitioner's brief that the language of the Third Circuit necessarily assumes an ambiguity in the written contract before reference may be made to the prior course of dealing between the parties or to their prior oral expressions of intent.

Also, petitioner infers throughout its brief that this case is the forerunner of a great and important series of cases, the disposition of which is balanced upon a final and comprehensive interpretation of the escalator clause. In fact, however, the theory by which petitioner expects to cumulate a contract calling for a fixed purchase price and an escalator clause contained therein into a contract in practical effect providing for payment of a profit over and above gross costs is so tenuous and imaginative that this case is believed by respondent to stand alone without a companion. Its importance can be measured only in terms of the amount which petitioner lost by entering into a contract which was not hedged against the contingencies and uncertainties of the future.

ARGUMENT

The whole theory and purpose of attempting the formation of executory contracts by the solicitation of competitive bidding is to protect the party purchasing the service or commodity from business risks occasioned by changes in prices of materials, from increases in delivery costs and from all other unstable elements recognized to exist in the business or commerce about to be engaged in.

The low bidder pits his skill and experience, his business judgment in the field of endeavor which the contract concerns, against the unforeseeable contingencies inherent in the contract. The measure of his profit, if any, is directly dependent upon his ability to cope with such contingencies as they arise. Such contracts constitute one of the keystones of the free enterprise economic system.

The contract entered into in the instant case is of that type. The only basis for differentiation which it contains is the escalator clause set forth above which during its tenure permitted changes in maximum ceiling prices made by the Office of Price Administration in the price of milk to be reflected in the price to be paid the petitioner by the respondent for the milk to be delivered pursuant to the contract. There was not one word in the contract or in the specific clause mentioned to justify a conclusion that it was the intent of the parties to establish a new cost basis in the event of the expiration of the Act creating the Office of Price Administration, or to alter the price of milk to be supplied as the costs of delivery might be influenced by directives of the Department of Agriculture, or to have any increase in commodity prices to the supplier absorbed by the consumer or to indemnify the petitioner from loss occasioned by entry into the contract.

In order to create sufficient ambiguity in the escalator clause to raise a question of intent the clause has to be rewritten. It will be noted that counsel for petitioner has obligingly done just this at page 11 of his brief, and having rewritten the clause he argues the ambiguity of his own creation and ignores the intent of the document as it was originally executed between the parties. But since the clause itself as written between the parties was without ambiguity, "The District Court was, therefore, bound to apply it as written rather than according to some asserted interpretation." (Opinion of Chief Judge Stephens, R. 55.)

Failing in the argument that by reason of ambiguity in the contract the court was required to examine the intent of the parties, petitioner urges the view that the Price Decontrol Board and the Department of Agriculture were in legal effect successor entities to the Office of Price Administration and that when full effect is given to the aggregation of their independent actions which brought about an increase in cost to the petitioner, the same amounts in legal

effect to an increase in a maximum ceiling price by the Office of Price Administration. This argument "is unsupported by either reason or authority," according to the United States Court of Appeals for the District of Columbia Circuit. (R. 54.)

In the first place, the Price Decontrol Board had no authority to fix, regulate, or increase prices. Under the Price Control Extension Act of July 25, 1946 that function remained vested in the Office of Price Administration. The Price Decontrol Board was given Congressional authority to determine which commodities might be safely withdrawn from the aegis of price control legislation without adverse effect to the public interest. Thus, when it by its directive relieved the Office of Price Administration of its authority to fix the price of milk, it exhausted the extent of its power. The directive certainly could not then be construed as a proclamation intended to arrogate to the Price Decontrol Board the power no longer existing in the Office of Price Administration to regulate the price of milk. Such price changes as came about obviously resulted from the creation of a free market in the commodity. These changes were, of course, also affected by the decision of the Department of Agriculture to withdraw the subsidies it had been paying to producers and distributors of milk. Its action was in all probability influenced by the removal of ceilings from the price of milk; since with the removal of ceilings a natural market could be established at price levels insuring a fair profit to efficient producers, and at the same time dispensing with the necessity for subsidies. It is therefore fair to say that the action of the Department of Agriculture was a logical development of the action of the Price Decontrol Board, but it is absurd to say that its action was in legal effect the act of the Office of Price Administration or that its action must be construed as an increase in the maximum price ceiling. Likewise its directive of an increase in the minimum price to be paid producers, while ultimately affecting the cost of all producers and all consumers not protected

by a continuing contract, cannot possibly be construed as a declaration of what the *maximum* price should be. Consequently, petitioner's second argument is as tenuous as its first.

Passing for the moment, however, the utter lack of merit in petitioner's case, the issue is not one deserving determination by this Court. Petitioner has failed to assert that the instant case is of such nature and character as this Court has indicated it will consider in Rule 38 (5) of its Rules and the issue is in fact not of such a nature. The law of contracts which the United States Court of Appeals for the District of Columbia Circuit has applied to this case has been long established as a fundamental concept of justice in contract litigation and is well buttressed by the precedent which that court has cited. The case of *A. M. Webb & Co., Inc.* v. *Robert P. Miller Co., supra,* cited by petitioner does not raise or even indicate a conflict of opinion between the local circuit and the Third Circuit. That portion of the opinion in the *Webb* case quoted by petitioner is, when paraphrased, to this effect: If the price is not unequivocally stated in the written agreement, the price agreed upon between the parties may be determined from their prior course of dealing and oral statements. However, in the instant case the price of the commodity was unequivocally stated and the limited circumstances in which the price might be altered were clearly and indisputably delineated.

This case is not one in which this Court must resolve a conflict between Federal Circuits.

Neither is it a case in which an important segment of Congressional legislation must be reviewed and construed in order to reach a disposition. Counsel for petitioner asserts that this case is the first to reach this Court wherein legislation of Congress creating the Decontrol Board is prayed to be reviewed and interpreted. Petitioner raises no question concerning the legality of the creation of the Price Decontrol Board nor does it raise any question concerning an interpretation of the functions of that Board. The

purpose, the scope, the duties and the powers of the Price Decontrol Board have always been clear enough. Petitioner is thus not seeking to have this Court enlarge or construe the jurisdiction of the Price Decontrol Board to encompass this contract, it is seeking to have this Court construe the language of the contract to encompass the action of the Price Decontrol Board. The attack is not upon legislation; it is not upon an action or directive of the Price Decontrol Board. The attack is directed to the construction to be given a clause contained in a private contract. In the absence of a showing that the holding of the court in this case went so far beyond rational concepts of justice as to adversely affect inherent property rights or a showing that the holding abridged or derogated a Constitutional principle it is submitted that the case is not one of sufficient importance to justify review by this Court.

CONCLUSION

It is respectfully submitted that the petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit should be denied.

VERNON E. WEST,
Corporation Counsel, D. C.,

CHESTER H. GRAY,
Principal Assistant Corporation Counsel, D. C.,

EDWARD A. BEARD,
Assistant Corporation Counsel, D. C.,
Attorneys for Respondent,
District Building,
Washington 4, D. C.